

*Mr. Jas. Montgomery*

November 13, 1760.

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# A N S W E R S

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Mr. JAMES MONTGOMERY, Advocate,

T O T H E

PETITION of the Principal and Masters of  
the United Colleges of *St. Salvator* and *St. Leo-  
nard's*, in the University of *St. Andrews*.

**T**HE above mentioned Petition, having been intimat-  
ed to the Respondent, agreeable to your Lord-  
ships Appointment, the following Answers are  
humbly offered on his Behalf, as his Majesty's  
Solicitor for the Tithes.

The Archbishop of *St. Andrews* had, in the Times of Po-  
pery, the conventional Brethren of the Priory of *St. Andrews*  
to be his Chapter; but this Priory being suppressed at the  
Reformation, and thereafter erected into a temporal Lord-  
ship, it became necessary, according to the Episcopal Go-  
vernment of the Church, established under King *James VI.* to  
appoint a new Chapter for that Archbishoprick.

By the 3d Act of Parliament, 18th *James VI.* entitled,  
"Act anent the Dilapidation of Bishopricks," it is statute  
and declared *inter alia*, "That by Reason it has been ever  
found, in all Times past, that the feuing of Lands, setting  
of Tacks, and doing sick other lawful Deeds, by Bishops  
A " and

“ and Prelates, of any Part of the Patrimony of their said  
 “ Benefices, should have the Consent of the most Part of  
 “ their Chapter, without whose Consent it was not leifome  
 “ to the said Prelates to do any of the said Deeds; therefore  
 “ the Estates discharge all Prelates and Bishops to do any  
 “ such Deeds, without Consent of their Chapters, or of the  
 “ greatest Number of them.”—The Statute then provides,  
 that the Chapters of the different Bishopricks throughout the  
 Kingdom, shall remain as they formerly were, only with re-  
 spect to the Archbishoprick of *St. Andrews*, as it was suppress-  
 ed by the new Erection of the Priory, “ whereby the said  
 “ Chapter ceases; therefore it is declared, that the said Chap-  
 “ ter of *St. Andrews* hereafter shall consist of seven Persons  
 “ of the Ministry, dwelling and having their Charge within  
 “ the Diocese of *St. Andrews*, to be elected and nominate by  
 “ the said Archbishop himself, to be the perpetual Convent  
 “ and Chapter of the said Archbishoprick in all Time com-  
 “ ing.”

This Power was confirmed to the Archbishop by the 8th  
 Act, Parliament 19th, *James VI.* “ to elect seven such Per-  
 “ sons to be the perpetual Convent, Council and Chapter of  
 “ the said Archbishoprick in all Time coming.”

But by the 2d Act, Parliament 22d, of *James VI.* a new  
 Nomination is made of this Chapter, and a Convent is parti-  
 cularly set down to the Archbishop, this Statute declaring,  
 “ That the Ministers serving the Cure at the Kirks under-  
 “ written, present and to come, shall be esteemed the Chap-  
 “ ter thereof, that is to say, the Prior of *Portmoak*, who is  
 “ Principal of *St. Leonard's College*, and Dean of the Chap-  
 “ ter, the Archdean of *St. Andrews*, &c.” and so goes on to  
 nominate Deans and Vicars of different Cures, to the Number  
 of twenty-four, to whom the full Powers, belonging to the  
 Chapter of that Archbishoprick are committed.

Your Lordships will observe that the Prior of *Portmoak*,  
 Principal of the College of *St. Andrews*, at the Time of this  
 new



new Nomination, happened to be Dean of the Chapter, and is descriptively so called in the Act of Parliament. But it cannot be pretended that the said Principal and his Successors in Office thus nominated as one perpetual Member of the Chapter, were thereby created Deans of the said Chapter in all Time coming. The Office of Dean was elective, it was a Church Dignity conferred by the Pope in the Times of Superstition, and after the Reformation came to be in the King's Grant.

And accordingly when King *Charles* the II. came to make an additional Endowment and Provision for this Dean and Chapter, by a Grant of the Tithes and Patronages, which formerly belonged to the Parsonage of *Kinkell*, as set forth in the Petition, he makes no mention of the Prior of *Portmoak*, or Principal of *St. Andrews*, but only of the Dean of the Chapter of the Bishoprick of *St. Andrews* for the Time being; the Signature was granted in the Year 1663, in favours of the Dean of the Archbishoprick of *St. Andrews*, containing a Right to the Tithes of *Kinkell*, and a Right to present to the six Churches within that Parsonage, with Consent of the Archbishop of *St. Andrews* only; but no Charter or Infeftment ever passed upon this Signature.

By the Abolition of Episcopacy in *Scotland*, in the Year 1689, this Grant, though it had been duly compleated by Charter and Infeftment, became ineffectual, and the Right reverted to the Crown. By several Acts immediately after the glorious Revolution, it is declared, in terms of the Claim of Right, "That Prelacy, and the Superiority of any Office in the Church, above Presbyters, is, and hath been an unsupportable Grievance and Trouble to this Nation, and contrary to the Inclinations of the Generality of the People ever since the Reformation, (they having reformed from Popery by Presbyters)" and therefore the Offices of Bishops or Prelates, and their Deans and Chapters, &c. were abolished out of this Kirk and Kingdom, and the Rights and Revenues pertaining to



to the ecclesiastical Dignities reverted to the Crown, which hath ever been looked upon and experienced, as one of the great Blessings derived to this Kirk and Kingdom, in consequence of the Revolution.

By virtue of these Laws abolishing Episcopacy, and all ecclesiastical Dignities, all Rights, whether of Superiority, Patronage, or Tithes, which formerly blonged to Prelates, or their Deans and Chapters, came to be vested in the Crown, and have been exercised with so much Benignity and Moderation, that, as might be naturally expected, all the Subjects interested, are ever desirous to discover and maintain those Rights in the Crown, and to prevent their being unduly alienated.

It happened however, that though the Name and Office of Dean of the Archbishoprick of *St. Andrews* was thus abolished with the rest, yet by the Inattention of the Crown's Officers, the Principal of the College of *St. Andrews* has been suffered, without any Shadow of Title, to receive the greatest Part of the Rents and Duties, payable by the Land-owners of these Parishes, by virtue of Leafes of their Tithes made to them prior to the Year 1663. This erroneous Payment has taken its Rise from the Circumstance above remarked, that in the Nomination of the Chapter for the Archbishop of *St. Andrews*, made by the Act 1663, one of the Persons appointed to be a Member of this Chapter is the Prior of *Portmoak*, or Principal of the College of *St. Andrews*, who at that Time was Dean of the Chapter, and is so designed in the Act.

But though the Principals of *St. Andrews* have, by this Mistake and Neglect of the King's Right, been suffered to reap and enjoy the Tack-duties payable for the Tithes of those Parishes, they have never exercised any other Act of Property; nor have they ever at any Period acted as Patrons, till within these seven or eight Years, that they have presented such Persons as have been named by the Heritors, to whom they had agreed to sell the Patronages. But, in respect of their Want of  
Title,

Title, a Procefs is juft now in Court againft them, to be free of the Bargain.

If the Univerfity had conducted their Meafures with more Moderation and Referve, they would have had a better Chance to continue this accidental Poffeffion without Obfervation or Challenge; but by grasping at too much, they have occafioned an Inquiry, by which their total Want of Title is difcovered, and it became the Duty of the Respondent's Office, to interpoze on behalf of the Crown, and the Intereft of the Land-owners, to object againft their Title, and oppofe their obtaining any Right from the Crown.

Some Years ago, the College began to demand from the Heritors, by Proceffes againft fome of them, Payment of Tithes, without regard to the old Tacks, which had formerly been the Rule of Payment. This alarmed the Heritors, and one of them raifed and executed a Procefs of Prorogation of his old Tacks, and declaratory of the King's Right to give fuch Prorogation, in which Libel, the Titles above ftated were fully fet forth, and to which Procefs, the Respondent being called as a Party, it would have been an inexcufable Neglect of Duty on his Part, if he had not taken fome proper Step to maintain his Majesty's Right; and, as he apprehends, the only proper Step was by the Inhibition complained of.

The College of *St. Andrews*, become fenfible that they have no Title to thefe Tithes, have applied to the Lords of his Majesty's Treafury for a new Grant, and formal Right from the Crown, and the Heritors interefted have alfo applied to oppofe this Grant, and maintain the Right of the Crown, as much more beneficial for them. And they are encouraged with the more reasonable Hopes of Succefs, as by the late Union of the two Colleges of *St. Andrews*, their Revenues, arifing from proper Titles, produce very fufficient and ample Salaries to the Principal and all the Profefors.

In thofe Circumftances, the Respondent apprehends it is his Duty to oppofe the Defire of this Petition. He muft take

the Liberty to assure your Lordships, that he never had any Correspondence or Concert with the Agents for the Heritors, no Doubt those Agents, as might be reasonably expected in such a Case, laid the Insufficiency of the Colleges Titles open to the Crown's Agent for Tithes, and by this Means the Respondent having come to the Knowledge of the Crown's Right, thought it was his Duty to interpose, in the only proper Manner, which he apprehends is by executing an Inhibition; and it will require very few Words, after what has been above stated, to justify and maintain the Propriety of this Step.

Your Lordships will clearly perceive, from the above State of the Case, that neither the Principal nor College of *St. Andrews*, have any Colour of Title to these Tithes and Patronages, but that, by virtue of the Statutes made after the Revolution, the Right is vested in the Crown, as come in place of the Dean and Chapter of the Bishoprick. And it will not alter the Case, whether it is understood, that the Crown was, or was not divested of the Right, by King *Charles* his Signature, ratified in Parliament, because, if the Crown was divested, it was only in favours of the Dean, to be Part of the Revenue of the Chapter, and not in favours of the Principal or College of *St. Andrews*, of whom there is not the least Mention in the Grant, and if the Crown was not divested, then the Right remains where it was.

It will also be manifest to your Lordships, that the Act, passed in the 20th Year of his late Majesty's Reign, incorporating the two Colleges, created no new Right, but only united the Rights and Revenues of both Colleges into one, that Statute cannot be construed to take a Right from the Crown; and the Words of it are sufficiently guarded, "That the Principal of *St. Leonard's* College shall continue to enjoy the Right he has, of granting Leases of the Tithes, &c." As therefore it is clearly instructed, that the Right is in the Crown, that the Petitioners have no Manner of Title, and  
that



that their Possession has been altogether precarious, and suffered by the Neglect of the Crown's Officers, the Petitioners can have no legal Plea to be continued in the Enjoyment of such a Possession, the Benefit of a possessory Judgment must be founded on a proper Title, of which there is no Vestige in this Case, neither can the Petitioners justly found upon the Act of Sederunt, or the Authority of Lord *Stair*, concerning the Possession of Benefices, or Ecclesiastical Rights, as that Rule relates only to the Revenues of the Clergy, and can in no Case be applied, where the Titles are not suppressed, or a-missing, but being extant and produced, clearly instruct a Right in the Crown, and not in the Party who has had a Possession manifestly unlawful.

It will admit of no Doubt, that the Respondent's Duty required a proper Course to be taken for maintaining the Crown's Right in this Case, and he apprehends, that this Inhibition was the only proper Method both to stop the tacite Relocation, that the Heritors may be brought to take their Tacks, if expired, from the Crown, which is undoubtedly Titular, and to interpel the Use of Payment which has been made to the Principal of the College of *St. Andrews*, without any Shadow of Title.

This has been the constant Practice in such Cases, and is authorised by the Opinion of our Lawyers: Lord *Stair* says, Title *Tiends*, Sect. 23d, "That Inhibition being duly used, "it interrupts tacit Relocation, or the Use of Payment, not "only for the Years wherein it is used, but for all other subsequent Years."—And again, *Lib. 4th, Tit. 24th, Sect. 2d*, he says, "That Inhibition is the legal Way of interrupting "tacit Relocation of Tiends, or Use of Payment."—And the same Doctrine is very distinctly laid down by Mr. *Erskine*, Title *Tiends*, Sect. 21st, where he says, "To stop the Effect "of tacite Relocation, the Titular must raise and execute an "Inhibition of Tiends against the Tackfman, which differs  
" much

“ much from Inhibition of Lands, and is intended merely to  
“ interpel or inhibit the Tacksman from further intermeddling.  
“ This Diligence of Inhibition may also be used at the Suit of  
“ the Titular, *against any other Possessor of the Tiends.*” And the  
only Use ever made of such Inhibitions, by the Officers of  
the Crown, is to regulate the Commencement of the Leases  
of Tithes, when they come to be exped in Exchequer by  
the Proprietors of the Lands.

*In respect of all which, the Respondent hopes that your Lord-  
ships will refuse the Desire of this Petition.*

FRA. GARDEN.